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April 19, 1977

Honorable Kenneth D. Gaver, M.D.
Commissioner, Texas Department of
Mental Health & Mental Retardation
P. O. Box 12668
Capitol Station
Austin, Texas 78711

Open Records Decision No. 160

Re: Whether audit report
on a grantee is an inter-
agency or intra-agency
memorandum excepted from
required public disclosure
under Section 3(a)(11) of
Open Records Act.

Dear Dr. Gaver:

You request our decision pursuant to section 7 of article 6252-17a, V.T.C.S., The Open Records Act, whether an audit report on a grantee to the grantee is excepted from required public disclosure by section 3(a)(11), the inter-agency and intra-agency memorandum exception. The information requested is a report of an audit of Developmental Disability Act grants received by the San Antonio Epilepsy Association. The audit was conducted by the Internal Audit Division of your Department. This concerns a federal grant program administered by your Department.

This is a completed audit report and comes within the terms of section 6(1) of the Open Records Act:

Without limiting the meaning of other sections of this Act, the following categories of information are specifically made public information:

(1) reports, audits, evaluations,
and investigations made of, for, or
by, governmental bodies upon comple-
tion

(Emphasis added).

You contend that despite this provision, the audit is excepted by section 3(a)(11) which excepts from public disclosure:

(11) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency.

This exception is patterned after a similar provision in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(5), and we have followed the interpretation and application of this exception by the federal courts. Attorney General Opinion H-436 (1974). The Supreme Court has explained that the exception is designed to protect the "deliberations comprising part of a process by which governmental decisions and policies are formulated." National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 150-151 (1975).

Another court has drawn a distinction which we believe is applicable here. The case involved a report of an evaluation by one agency of another described by the trial court as consisting of

"evaluations and factual data are not solely, or even largely, a part of the pre-decisional . . . process, but rather reflect final objective analyses of agency performance under existing policy."

The Court explained:

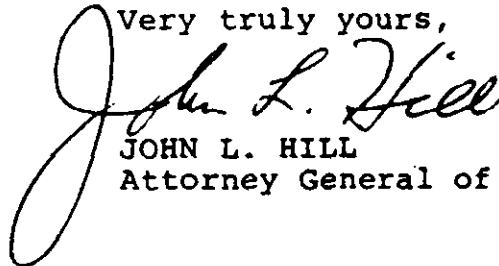
[I]t is not enough to assert, in the context of Exemption 5, that a document is used by a decisionmaker in the determination of policy. . . . Rather, to come within the privilege and thus within Exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take -- of the deliberative process -- by which the decision itself is made.

Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

The audit report here is solely factual and evaluative, and makes no recommendations or suggestions concerning the formulation of policy by your Department. While this audit report might initiate and be used in a deliberative process concerning action in regard to the grants involved, the facts and conclusions drawn in it are not a part of the deliberative process itself. You contend that Open Records Decision No. 106 (1975) should apply to except the audit report at issue here. The information involved there is factually distinguishable. That Decision dealt with memoranda prepared by supervisory personnel at various administrative levels recommending appropriate action by the Department of Public Safety following an investigation of alleged misconduct on the part of officers. The memoranda were an integral part of the deliberative process. We held that they were excepted under 3(a)(11), but that the Department's final action had to be disclosed.

It is our decision that this audit report is not an inter-agency or intra-agency memorandum, and not excepted from required public disclosure by section 3(a)(11). Completed audits, such as this one, are expressly required to be made public.

Very truly yours,



JOHN L. HILL
Attorney General of Texas

APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman
Opinion Committee

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